

Labour and Environmental Sustainability

Literature Review – Dutch Texts

by
Miriam Kullmann

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A Green Mentality for Collective Bargaining

A EU research project led by



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Agreement – A Green Mentality for Collective Bargaining aims at investigating how and why collective bargaining can contribute to embed the principle of environmental sustainability into labour relations, without abandoning but reinvigorating the ideals of justice, equality and democracy that justify the traditional and selective goals of the EU social model and collective bargaining regulation. The research project is based on the idea that there is no contradiction between environmental sustainability and the fundamental ideals and functions of labour law and industrial relations. The project covers 6 EU countries: France, Hungary, Italy, the Netherlands, Spain and the UK.

The Agreement project is co-funded by the European Commission, DG Employment, Social Affairs and Inclusion, under budget heading VP/2017/004 (Grant Agreement VP/2017/004/0037), Improving expertise in the field of industrial relations.

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Introduction

In the academic literature, the notion sustainability is used in a variety of contexts, such as public procurement, environmental law, finance and corporate law, agricultural law, and construction law, but not specifically in relation to (the combination of) labour (law) *and* the environment. At the same time, taking a closer look at the (history of) trade union policy, we see that environmental issues and labour are – sometimes more and sometimes less – addressed. Therefore, in the following we will, first, briefly explore the areas that address the idea of sustainability as can be found in the current Government’s vision. Second, we will continue by providing information on the role of sustainability in the context of public procurement and competition law. Third, we will focus on environmental sustainability in the context of corporate social responsibility. This will, fourth, be followed by a brief introduction on the role of the Social Economic Council (*Sociaal-Economische Raad*), a tripartite institution acting as an advisory body in which employers, employees and independent experts (Crown-appointed members) work together. Fifth, the role of the largest Dutch Trade Union Confederation, FNV, in taking environmental (and to some extent sustainability) concerns into consideration when defining their policies will be introduced. And finally, the (legal) position of works councils will be mentioned.

A sustainable future for the Netherlands – the Dutch Government’s vision

In the Government’s Coalition Agreement 2017¹, the idea of a sustainable future for the Netherlands is expressed and explored. Sustainability is explored in relation to the following subjects: climate and energy, transport and mobility, gas extraction, agriculture, food, nature, fisheries and animal welfare, and the quality of the environment. Aiming for an ambitious climate policy, the Government’s plans are to reduce CO₂ emissions, and by making the built environment, i.e. making housing more sustainable, and transport more sustainable by introducing a greener tax system and tapping new sources of energy. At the same time, sustainability, induced

* I would like to thank Rik van den Beukel and Ingeborg de Koningh (both Leiden University) for excellent research assistance.

¹ Coalition Agreement 2017-2021, *Confidence in the Future*, 41-51.

by EU obligations, plays a role when it comes to sustainable public finances², which is seen as a benchmark that is taken into account when considering the financial impact of the abolition of the uniform premium system and the transition to a new method of pension accrual by temporarily relaxing the tax framework. Measures that have an impact on the market and most likely also the employment situation of many workers concern, e.g., the phasing out of coal-fired power plants by 2030 while designating more sites for offshore wind power, exploring new forms of building-specific finance that makes energy-saving measures an attractive option for individual homeowners encouraging the construction sector to develop innovative ways to make housing more sustainable. In the context of passenger transport, a measure that might have an impact on employment is the use of autonomous vehicles in combination with the development of new mobile applications and route planners. Also, the goods transport sector will face limitations by requirements that induce the use of quieter goods trains. With regard to the maritime and inland shipping sectors, a sectoral Green Deal is aimed for. Within the agricultural sector, sustainable food supply is an aim to achieve, likely having an impact on current farming strategies.

Tripartite and Other Institutions Dealing with Socio-Economic, Employment and Environmental Concerns

a. The Social Economic Council

The Social Economic Council of the Netherlands (SER) was founded in 1950 pursuant to the Dutch Industrial Organisation Act. Employers, employees and independent experts are represented in the Council. The SER is an independent body that advises the government and parliament on the outlines of national and international social and economic policy. Moreover, the Council advises on important legislation in the social and economic sphere³. The SER is also responsible for facilitating agreements and covenants between important actors in the Dutch society.

The SER is an institutionalised form of what is known as the generic approach for collaborative and consultative decision-making between relevant stakeholders, i.e. employers' and employees' representatives and the government (Dutch

² Article 119(3) TFEU.

³ SOCIAAL-ECONOMISCHE RAAD, *Sociale ondernemingen: een verkennend advies*, 2015, 2.

neocorporatism). This is referred to as the (socio-economic) Polder Model which became known in the context of the Dutch transition in the late 1970s from being a problem child to a ‘miracle’⁴. One key incident that is often referred to as ‘the beginning’ of the Polder Model is the Accord of Wassenaar from 24 November 1982 in which employers’ and employees’ representatives agreed – although non-binding – on stimulating employment growth, wage moderation and job creation, whereas the government took action by agreeing on tax cuts⁵. What followed was an improvement in the economic situation, receiving also international attention. While it is contested whether the Polder Model as such provides an explanation of the economic success, it provides a constructive platform to discuss and find fruitful solutions⁶.

This consensus approach has served as an example for creating what in the literature became known as the Green Polder Model, a platform where environmental policies are addressed by other actors, mostly environmentalist organisations, than those participating in the socio-economic Polder Model⁷. Yet, such a Green Polder Model never became institutionalised.

The role of the SER on social and economic policy and legislation has to be seen in a broad sense, meaning that the role of the Council also includes addressing issues, in its advisory role, on labour and environmental sustainability. Although labour has been an important subject from the beginning of the SER in 1950, environmental sustainability started to gain attention as early as 1990. Based on the exponential increase in the number of publications on environmental sustainability by the SER in 2016, environmental sustainability became a main subject for the Council after the Paris Agreement in December 2015.

Until recently, the perspective of the SER on sustainability was environmental and economic. However, on 24 September 2018, the Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*) requested the SER to advise them on development through sustainable business, sustainable development goals and

⁴ L. KARSTEN, K. VAN VEEN, A. VAN WULFFTEN PALTHE, *What Happened to the Popularity of the Polder Model? Emergence and Disappearance of a Political*, in *International Sociology*, 2008, n. 23, 35.

⁵ *Ibid.*, 44.

⁶ P. GLASBERGEN, *The Green Polder Model: Institutionalizing Multi-Stakeholder Processes in Strategic Environmental Decision-Making*, in *European Environment*, 2002, n. 12, 303, 306.

⁷ *Ibid.*, 307-308.

corporate social responsibility⁸. The request also referred to the UN Guiding principles on Human Rights⁹. This means that the perspective of the SER on sustainability will be broadened and will include the relation between labour (law) and the environment.

b. The Labour Foundation (Stichting van de Arbeid)

Besides in the Social-Economic Council, the Dutch social partners come together in the Labour Foundation (*Stichting van de Arbeid*), a national consultative body in which the three peak trade union federations and three peak employers' associations in the Netherlands take part. Basically, it is a forum for its members to discuss labour and industrial relations issues and to prepare memorandums, statements or other documents where recommendations for the collective bargaining procedures. Like the Social-Economic Council, also the Labour Foundation can be asked to give advice. Given the Foundation's narrow field of action, it does not deal with labour and environmental issues unless the two topics are or become part of the bargaining on employment conditions.

c. The Dutch Federation of Trade Unions: current position and vision

The Dutch Federation of Trade Unions is a member of the Social-Economic Council, where it discusses a variety of issues together with representatives of employers and the state. FNV is the largest federation, having approximately one million members in a broad range of sectors and branches. In its 2017 Statutes, Article 4.2. sub j, k and l, the FNV's tasks concern to encourage a societally responsible and useful production of the provision of goods and services, a responsible use of natural sources and the natural environment/surroundings realising their vulnerability and finiteness, the right of all to a mental and physical healthy living and working climate¹⁰. As FNV is based on membership, it is the members that influence and determine FNV's overall policy.

In its multi-year policy plan 2017-2021, FNV stresses that in the context climate change a more sustainable economy and a new balance between environmental and employment interests is needed. One problem FNV faces is that most of its members still are employed in the 'old' economy, where changes will occur and

⁸ MINISTERIE VAN BUITENLANDSE ZAKEN, *Adviesaanvraag SER Ontwikkeling door duurzaam ondernemen*, 24 September 2018.

⁹ *Ibid.*, 2.

¹⁰ FNV, *Statuten Federatie Nederlandse Vakbeweging*, 27 June 2018.

where FNV sees for itself a role in finding a new position in newly developed and developing sectors. Similarly, in its Association Plan 2014-17, it is stated that FNV envisions a sustainable management of the earth, and a socially justified solution of the impact of global environmental policy on work.

The Dutch Federation of Trade Unions has established a climate group (*klimaatgroep*) that addresses a variety of issues, such as energy transition and employee involvement therein¹¹ and changing the production processes, not only in individual companies or sectors but the economy in general¹².

As the background note on FNV's policy on Climate and Energy stresses, FNV is not an organisation that has as its core business climate change and energy policy neither does it aim to develop expertise in these areas¹³. That does, however, not mean that the environment, earth warming or energy transition are areas that are not related to the interests of workers and sectors, as they (may) have an impact on employment. Key driver seems to be the statement that there are no jobs on a dead planet. Nevertheless, FNV is aware of the fact that trying to balance between environmental and employment/work interests can be contradictory. As workers experience the impact of climate change in two ways, namely at work and in their living environment, one main task for FNV is to assess the effects and interests on work and income, which is the core business of FNV. FNV is concerned about the fact that a sustainable economy not necessarily creates decent jobs and aims to contribute to the transition of those workers in the old economy so that they will find a job in the new economy¹⁴.

What is interesting is, when reading the FNV's position documents¹⁵, that it engages with questions on the environment and work at various levels (international, national, and local), developing visions and statements, trying to get the employees' interests and perspectives on the agenda. An important means is, as has been set out earlier, to give advice on environmental (and work) issues as a

¹¹ P. VAN KLINK, *De FNV en het klimaat: eerlijk omschakelen*, in L. VAN BAAREN, R. MARIJNISSEN, P. VAN KLINK (eds.), *De vernieuwde FNV, lokaal vakbondswerk en het klimaat*, Grenzeloos, 2017, 22-23.

¹² *Ibid.*, 24-25.

¹³ E. BOS, *Inhoudelijke achtergrondnotitie FNV (staand) beleid Klimaat en Energie*, 21 June 2018, 6.

¹⁴ See also <https://www.ituc-csi.org/kitty-jong-fnv-netherlands?lang=en>.

¹⁵ E. BOS, *Inhoudelijke achtergrondnotitie FNV (staand) beleid Klimaat en Energie*, cit.

member of the Social-Economic Council¹⁶. Whether the FNV is actively bargaining on labour and environment and including the outcomes in collective agreements has to be seen when having studied a select group of collective agreements.

d. The role of works councils

Article 25(1)(l) Works Councils Act (*Wet op de ondernemingsraden*) gives works councils the right to advise the entrepreneur on an intended decision, which includes advice on taking an important measure in relation to the company's concern for the environment, including taking or changing a policy, organisational and administrative provision in connection with the environment.

Le Blansch discusses why and how employee participation in environmental matters¹⁷. By means of co-determination he indicates that there is a general consensus that the current legal instruments, or at least the ones in force around 1991, are sufficient to achieve participation in environmental matters. This is where Article 2 Works Councils Act plays an important role, since it states that the Works Councils Act exists in the interest of the company in all its objectives, including environmental objectives. In addition to Article 2 Works Councils Act, Le Blansch states that any broad interpretation or redress will be necessary for environmental matters to fall under the statutory powers. In the context of Article 25(1) Works Councils Act, the works council will have to take the initiative itself to include environmental criteria in an advisory report¹⁸. Le Blansch warns against frictions that may occur as a result of the inclusion of environmental issues by the works council, which can lead to adverse effects on employee participation.

Apart from Article 25(1) Works Councils Act, also Article 28(4) of the Works Councils Act is relevant. This provision concerns the promotion of the company's own responsibility for the environment by the works council. This is only possible if the works council has insight into the company's environmental policy, for example by invoking information law, or whether an environmental program is drawn up during the general consultation. In practice, the works council gains

¹⁶ E. BOS, *Inhoudelijke achtergrondnotitie FNV (staand) beleid Klimaat en Energie*, cit., 1; <https://www.ituc-csi.org/kitty-jong-fnv-netherlands?lang=en>.

¹⁷ K. LE BLANSCH, *Betrokkenheid van werknemers bij bedrijfsinterne milieuzorg: Een verkenning van een nieuw terrein van medezeggenschap*, in *Tijdschrift voor Arbeidsvraagstukken*, 1991, n. 1, 18-27.

¹⁸ *Ibid.*, 22.

insight through the sustainability report that a company draws up, in which the company accounts for its efforts in sustainability or corporate social responsibility. The works council can further monitor the care for the environment in the following ways¹⁹:

- Sustainable purchasing;
- Sustainable mobility;
- Supervision of sustainable building by the company by the works councils;
- Assessing the extent to which sustainable energy use is realistic for the company;
- Specific attention to the environment.

Article 28 Works Councils Act can provide extra legitimacy for the works council to engage with environmental issues²⁰.

Role of Employment and Environment in (Soft) Law

a. Sustainability in public procurement and competition law

(Aspects of) sustainability can be part of the public procurement tender. However, it seems that sustainability or aspects related to sustainability are hardly used in the context of procuring construction works.²¹ Overall, however, there is a possibility to make construction more sustainable through public procurement.²² This is related to the discussions about the circular economy that the Government wishes to establish by 2050. Part of this initiative is the National Raw Material Agreement (*Nationaal Grondstoffenakkoord*), signed by employers' and employees' representatives, environmental organisations, municipalities and others, that is said to facilitate a transition towards a circular economy. In that Agreement, the following five sectors are prioritised: (1) biomass and food; (2) plastics; (3) manufacturing; (4) construction; and (5) consumer goods. More particularly, a Transition Agenda Circular Construction Economy (*Transitieagenda Circulaire*

¹⁹ J. KOOISTRA, *De bevorderende en bewakende taak van de ondernemingsraad: Verkenning van artikel 28 van de Wet op de Ondernemingsraden*, CAOP, 16 December 2016, 13-21.

²⁰ K. LE BLANSCH, *Betrokkenheid van werknemers bij bedrijfsinterne milieuzorg: Een verkenning van een nieuw terrein van medezeggenschap*, in *Tijdschrift voor Arbeidsvraagstukken*, 1991, n. 1, 22.

²¹ T.A. TERLIEN, D. SANTURIO GONZÁLEZ, *Duurzaam aanbesteden: hoe te komen tot een 'groen werk' in bouwteners?*, in *Bouwrecht*, 2018, n. 46, 229.

²² S.J. PETIET, E. VERWEIJ, *Duurzaamheid en maatschappelijk verantwoord ondernemen bij aanbestedingen*, in *Bedrijfsjuridische berichten*, 2018, n. 30, 131. See on this also Directive 2014/24/EU on public procurement.

Bouweconomie) has been agreed upon. While public procurement actually encourages public authorities and undertakings participating to promote sustainability, that enthusiasm might be hampered where there are agreements between undertakings that possibly limit competition among them and their competitors.

It is, for instance, possible that undertakings that contract with each other for the supply and delivery of goods and services, agree that certain environmental or climate standards will be taken into account (e.g., reducing CO₂ emissions). Depending on what exactly the parties agree, it may be that such agreements limit the competition among undertakings and therefore are prohibited under EU and national competition law²³. Like collective agreements, as the CJEU ruled in *Albany*²⁴, however, agreements between undertakings can be exempted from the competition rules if they meet the following criteria: (1) the agreement leads to an improvement in production or of the distribution or promotion of the technical or economic progress (otherwise there are efficiency gains); (2) a fair share of the results benefits consumers; (3) the measure is necessary to achieve these benefits and does not go beyond what is necessary; (4) the agreement does not have the effect of restricting competition on a particular market, or substantial part of the market. Despite the agreement, therefore, there must be sufficient room to remain to compete (so-called requirement of residual competition). One example which did not meet the criteria was the Energy Agreement of the Social Economic Council (see for a more detailed discussion of the tripartite body below, section 5.). The Energy Agreement determined that a number of out-dated and therefore relatively highly polluting coal-fired power stations will be closed with the aim of emissions, including CO₂ emissions. This was qualified as an agreement between companies limiting the quantity of electricity to be produced thus constitutes an agreement that restricts competition. One major problem was that the effects of that agreement did not lead to monetary value for customers, as was calculated by the Netherlands Authority for Consumers and Markets²⁵.

²³ N. KOEMAN, A. KOEMAN, *Klimaatbeleid en mededinging*, in *Nederlands Juristenblad*, 2016, n. 93, 2372.

²⁴ Case C-67/96 *Albany* ECLI:EU:C:1999:430. See also Case C-413/13 *FNV Kiem* ECLI:EU:C:2014:2411.

²⁵ The Netherlands Authority for Consumers and Markets calculated the value of the expected environmental benefit (i.e. the reduction in CO₂ emissions) based on the European Emission Trading Scheme and weighed this gain against the expected price increase. The Netherlands Authority for Consumers and Markets noted that on balance there were no welfare benefits.

b. Corporate social responsibility

Environmental sustainability can be seen as a condition and a chance for innovation²⁶. Zwetsloot notes that environmental sustainability and the impact of work on the environment have become increasingly important themes in the conduct of labour in companies, leading more and more to policies such as corporate social responsibility (*maatschappelijk verantwoord ondernemen*). Corporate social responsibility cannot be seen separated from social dimensions, leading to the idea of sustainable employment (*duurzame arbeid*). According to Zwetsloot, sustainable employment touches upon four aspects of the quality of labour, being the content of labour, labour relations, labour conditions and labour environment²⁷. An important aspect of sustainable labour is the increasing importance that the labour force attributes to the meaningfulness of their labour. In this sense, good employers are intricately connected to socially responsible entrepreneurship. Zwetsloot tracks a change in labour relations from being directed at financial gains, to a new vision on labour relations, where the emphasis is put on the company as a living organism. Such a vision is characterised by delivering meaningful products, high levels of trust between the employer and employee, and a high level of attention to the safety, health and welfare of employees. He further argues, based on recent findings, that companies who base their business on the second vision, display higher levels of innovation and value creation, compared to companies which revolve around financial gains.

²⁶ GIJM ZWETSLOOT, *Duurzaam werken en ondernemen in de kenniseconomie*, in TNO, *Kwaliteit van Leven*, 2008, 151-161.

²⁷ *Ibid.*, 155-156.